IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1793

WINFIELD L. ROBERTS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR WINFIELD L. ROBERTS

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OPINION BELOW

The court of appeals affirmed the judgment of the district court without opinion (Pet. App. 1a-2a).

JURISDICTION

The amended judgment of the court of appeals (Pet. App. 2a) was entered on February 23, 1979. A suggestion for rehearing *en banc* was denied on April

30, 1979 (Pet. App. 3a-23a). The petition for a writ of certiorari was filed on May 30, 1979, and was granted on October 1, 1979. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

QUESTION PRESENTED

Whether the district court may consider the defendant's failure to cooperate with the government as a relevant factor in imposing maximum consecutive prison sentences.

STATEMENT

Petitioner and Charles J. Thornton were jointly indicted in the United States District Court for the

District of Columbia in a five count indictment including one count of conspiracy and four counts charging unlawful use of a telephone to facilitate the distribution of heroin. 21 U.S.C. 841(a), 846, 843(b). In 1975 petitioner pleaded guilty to the conspiracy count and received a sentence of four to fifteen years imprisonment, a three year special parole term, and a $5,000 fine. The conviction was vacated on appeal because the government had not fully disclosed the details of the plea agreement to the district court. *United States v. Roberts*, 570 F.2d 999 (D.C. Cir. 1977). Upon remand, petitioner pleaded guilty to two of the four counts alleging unlawful use of the telephone which carried a maximum penalty of four years imprisonment and a $30,000 fine on each count. He was given maximum four year consecutive sentences totalling two to eight years imprisonment and a three year term of special parole.[1] Although the conviction was summarily affirmed and a suggestion for rehearing *en banc* was denied, two judges submitted opposing statements concerning the merits of rehearing the case (Pet. App. 3a-23a).

Prior to the first sentencing, the government filed a written allocution outlining a drug distribution scheme between petitioner and Thornton (A. 10-21). The allocution—which sought "a substantial term of incarceration and fine"—concentrated on the nature of the case, petitioner's role in it and his prior conviction for bank robbery as the grounds for its recommendation. That lengthy document but adumbrated the final

[1] In its amended judgment, the court of appeals vacated this term of special parole because it was not authorized by the statute, 21 U.S.C. 843(b). (Pet. App. 2a.)

sentencing refrain of the prosecutor, *viz.*, its sole reference to *cooperation* as follows:

> ". . . [Petitioner] was told that we were desirous of obtaining his cooperation in testifying against Thornton, and that the nature and extent of his cooperation would be determinative of the charges which could be brought against him." (A. 16). (footnote omitted.)

In a concise memorandum filed prior to the sentencing proceeding now under review, the government referred the district court to its previous written allocution and sought the imposition of maximum consecutive sentences. No mention was made of petitioner's failure to cooperate with the government as a sentencing factor (A. 22-23).

On behalf of petitioner a motion was filed seeking, *inter alia*, concurrent sentences on the two phone counts (A. 3-5). The pleading noted that, in the experience of counsel, concurrent sentences were the common practice in district court in cases such as this:

> "Furthermore, we know of no case in this jurisdiction where consecutive sentences were imposed for violations of 21 U.S.C. §843(b) (counts 2 and 5) and we have found no appellate opinion from any circuit wherein telephone counts resulted in anything but concurrent sentences as a matter of fact." (A. 4-5).

In its written response the government did not dispute these factual assertions of sentencing practice (A. 5-8). At the sentencing hearing, counsel for petitioner echoed his written motion by observing once again that to his knowledge no district court judge had ever imposed consecutive sentences on guilty pleas to

two telephone counts (A. 28). Indeed, the prosecutor stated that in seeking maximum consecutive sentences the government was "going against a rule of general usage, of customary practice in this courthouse." (A. 34) With that, the prosecutor for the first time launched his primary reason for seeking that extraordinary sentence:

> ". . . I haven't always been as harsh in asking for a particular sentence as I am in this case, and I would like to explain why the Government has taken this reason, so as not to appear as a Simon Legree." (A. 34-35)
>
> * * * *
>
> "We solicited Mr. Roberts' cooperation to testify in the Grand Jury and at trial against Mr. Thornton. We promised him that the nature and extent of his cooperation would be made known. Suffice it to say what we offered him was a plea bargain on a silver platter, from which he would have emerged perhaps with some jail time, but with certainly a plea offer to a much less serious offense than what has ultimately transpired in the case.
>
> Thereafter he began to cooperate, as Mr. Palmer noted. He told us what the terms 'street' and 'half street' meant. He told us how he delivered drugs in his girlfriend's Jaguar to Mr. Thornton. He told us a number of things which incriminated him. But when we asked him to go a step further and identify the person or persons from whom he was getting the drugs, and the location, and to lay out the conspiracy and identify other co-conspirators who were involved with them, he balked.
>
> At that point, despite repeated entreaties to secure his cooperation to go that extra step, he adamantly refused. And of course what resulted

was an indictment charging him with conspiracy, and only five telephone counts, though there were a maximum of 13 calls we could have indicted him for.

Throughout the long process that has occurred from June of 1975 when he first came into my office, up to today, he still has refused to cooperate.

So as we stand here today as a prosecutor I am not in a position as I would be in many cases, in dealing with defendants like Mr. Roberts, and cases like this involving drugs, to come to the Court and say, Your Honor, we would ask you to take into account some extenuating and mitigating circumstances, that the defendant has cooperated by providing us with certain information. He has stonewalled it.

So we find it somewhat ironic for counsel to plead on Mr. Roberts' behalf, and to ask for probation, when a defendant over a course of many, many years, knowing what he faces, and knowing that we desired the information, still refuses to disclose it." (A. 35-36).

The prosecutor then alluded to the more traditional factors in seeking this rare sentence, *e.g.*, petitioner's supplier role in the case for purely monetary purposes and his 1968 bank robbery conviction. In concluding his allocution, the prosecutor once again centered on petitioner's failure to cooperate in the investigation–a refusal which appeared to personally irritate him:

> "When Mr. Roberts had an opportunity to get a deal on very good circumstances, he threw it up in our face." (A. 37)
>
> * * * *
>
> "Your Honor, when you take into account, the seriousness of this offense, . . . , where he himself was not an addict, where he had been unemployed, . . . , where he refused to assist the Government and thereby brought down on his head charges much more severe than would have been brought down, its the Government's feeling that the appropriate sentence in this case is as we suggested." (A. 38)

After this constant hammering away at the failure-to-cooperate theme, the district court was persuaded thereby, and relied upon this as a substantial factor in imposing maximum consecutive sentences on petitioner:

> "THE COURT: Mr. Roberts, we have considered your case very carefully. We have noted again you were on parole from a bank robbery conviction, which you have had prior involvement with the law. In this case you were clearly a dealer, but you had an opportunity and failed to cooperate with the Government. Accordingly, it is the judgment of the Court that on each of these two counts you be sentenced to a term of one to four years, that those counts be consecutive, and in addition that there shall be a three-year term of special parole. We are not imposing a fine." (A. 40-41)

ARGUMENT

IT IS IMPERMISSIBLE FOR A DISTRICT COURT TO RELY ON THE DEFENDANT'S FAILURE TO COOPERATE WITH THE GOVERNMENT AS A SUBSTANTIAL SENTENCING FACTOR.

As the record reflects, the district court imposed maximum consecutive prison terms upon petitioner

relying in substantial part on the latter's refusal to cooperate with the government. That conclusion inexorably flows from a review of the prosecutor's forceful allocution, the conceded rarity of consecutive sentences on pleas to several phone counts, and, the responsive statement by the district court immediately prior to the imposition of sentence that failure "to cooperate with the Government," was one of the three factors it was relying upon. Because the sentence was thus, substantially influenced by an impermissible determinant it must be vacated. *Di Giovanni v. United States*, 596 F.2d 74 (2d Cir. 1979).

Simply put, the district court erroneously punished petitioner for exercising his Fifth Amendment right against self-incrimination. In the first encounter between petitioner and the prosecutor the latter advised him pursuant to the requirements of *Miranda*,[2] that he had the right, *inter alia*, to remain silent and that anything he said could be used against him (A. 16). So cautioned, petitioner made several statements in which he incriminated himself, but adamantly refused to go further; declining to testify against his projected co-defendant, Thornton, or identify the person or persons from whom he had received the heroin (A. 16-17, 35-36). He was thereafter arrested and indicted in the present case. Subsequent to his making these initial incriminating statements petitioner—now represented by counsel—once again consistently refused to incriminate himself any further by detailing the full contours of his criminality (A. 35-36). This voluntary cessation of the flow of damaging information was a foreseen circumstance dealt with by the Court in *Miranda*:

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege. 384 U.S. at 473-4 (footnote omitted).
>
> Opportunity to exercise these rights must be afforded to him throughout the interrogation." *Id.* at 479.

We cannot believe that our system of criminal justice permits petitioner to be punished in substantial part because he properly relied on accurate legal advice first imparted to him by the prosecutor. Indeed, it seems in retrospect somewhat anomalous for the prosecutor—who remained the same throughout—to have so fervently urged the imposition of maximum consecutive sentences for non-cooperation, when petitioner but took him at his word and remained silent.

Furthermore, petitioner's guilty pleas have no bearing on the invalidity of his sentence for those pleas did not abrogate his right to remain silent. In the first place, there is substantial support for the proposition that even as to those matters encompassed by a guilty plea, the privilege remains *prior to* sentencing. *United States v. Houghton*, 554 F.2d 1219, 1222 (1st Cir. 1977) (Witness could refuse to testify "until after he was sentenced."). This results from the fact that the "[f]inal judgment in a criminal case means sentence. The sentence is the judgment." *Berman v. United States*, 302 U.S. 211, 212 (1937). See *United States v. Ross*, 464 F.2d 376, 379 (2d Cir. 1972). Rule 11(e), (6), Fed. R. Crim. P., underscores this by providing that

evidence of a guilty plea and statements made by a defendant in connection therewith are not admissible in evidence against him, should the plea later be withdrawn, *i.e.*, when there is no imposition of sentence. It is clear that petitioner could, therefore, legally remain silent and not be compelled to testify prior to the imposition of sentence–it was, accordingly impermissible for him to have been penalized for exercising his constitutional guarantee against self-incrimination. In these circumstances, the Court should quickly shut the door on this flagrant method of attenuating by its mere exercise "one of our Nation's most cherished principles."[3]

Assuming arguendo that petitioner's March 20, 1978, guilty pleas resulted in the waiver of his Fifth Amendment rights,[4] that waiver did not extend to the information sought by the prosecutor. At the sentencing of April 21, 1978, the latter fully explained that his concept of cooperation included testimony by petitioner against his co-defendant Charles J. Thornton and for him to "identify the person or persons from whom he was getting the drugs, and the location, and to lay out the conspiracy and identify other co-conspirators who were involved with them." (A. 36) It is readily apparent that such information could and would implicate petitioner in other serious crimes. The indictment

[3] *Miranda v. Arizona, supra*, at 457-458.

[4] Although we are confident in our argument that a guilty plea does not dissolve Fifth Amendment rights prior to sentence, dicta in opinions not considering the precise issue have pointed the other way. *McCarthy v. United States*, 394 U.S. 459, 466 (1969); *United States v. Sanchez*, 459 F.2d 100, 103 (2d Cir. 1972).

herein charged petitioner and Thornton with a narcotic conspiracy from March 10, 1975, through March 16, 1975, along with four substantive counts charging them with illegal use of the telephone within the same six day time frame. The government's theory, repeatedly announced with charts and the like, was that petitioner supplied Thornton with drugs which the latter sold through his intermediaries (A. 14-16). Were petitioner to fully and truthfully testify against Thornton, he would necessarily incriminate himself in numerous illegal narcotic distributions to Thornton in violation of 21 U.S.C. 841(a). Were he further to "lay out the conspiracy" in detail, he would also incriminate himself as to additional substantive offenses with his "supplier(s)" and in one or more conspiracies in this and possibly other jurisdictions. Since there is not one scintilla of doubt that prosecutions for the above-described offenses survived petitioner's guilty pleas,[5] his Fifth Amendment privilege remained intact insofar as the requested "cooperation" was concerned. Thus, however viewed, petitioner was impermissibly punished in substantial part because he sought refuge in his normally unfettered right to remain silent.

In remaining silent about his confederates petitioner was not called upon to detail his reasons for doing so; indeed, that judicial inquiry would itself have been

[5] For a sampling of the legion of cases supporting this proposition, see *Pinkerton v. United States*, 328 U.S. 640 (1946); *Blockburger v. United States*, 284 U.S. 299 (1932); *United States v. Hodges*, 502 F.2d 586 (5th Cir. 1974); *United States v. Gloria*, 494 F.2d 477 (5th Cir. 1974); *United States v. Johnson*, 488 F.2d 1206 (1st Cir. 1973); *Nolan v. United States*, 423 F.2d 1031, 1047-8 (10th Cir. 1969).

improper. It goes without saying that an informer's life is not free from reprisal and it is universally understood that this fear of bodily harm ordinarily inclines one to resist being pressed into so dangerous a government service. In his statement as to why he voted for rehearing *en banc*, Judge Bazelon observed: "[Petitioner] balked only when asked to identify his powerful suppliers, fearing that to do so would endanger his life. . . ." (Pet. App. 7a) See on this score, *United States v. Toombs*, 497 F.2d 88, 90 (5th Cir. 1974) (Heroin conspiracy, informer shot three times, n. 1); *Swanner v. United States*, 406 F.2d 716 (5th Cir. 1969) (Informer's house bombed injuring him, his wife and two grandchildren); *United States v. Pacelli*, 491 F.2d 1108 (2d Cir. 1974) (Witness in narcotics case stabbed to death and body burned); *In Re Quarles*, 158 U.S. 532 (1895) (Informer beat, bruised, shot at "and otherwise ill-treated."); *Schuster v. City of New York*, 5 N.Y.2d 75, 154 N.E.2d 534 (C.A. N.Y. 1958) (Informer murdered.) In weighing and rejecting the offer put to him, petitioner was mindful of the fact that his role was to be that of what we may term a high visibility informant as opposed to a subliminal one. The latter does not usually surface, but rather is employed behind the scenes turning up anonymously in search warrants. As to this type of informant see *Rugendorf v. United States*, 376 U.S. 528 (1964). The prosecutor, however, envisioned more of a front line role for petitioner including testimony at a public trial which, of course, greatly escalated the danger to his safety. Who can fault petitioner for declining the invitation to cooperate in these circumstances–much less penalize him. In conjunction with this, when we look at the benefits to be

accorded him were he to cooperate and give up his Fifth Amendment rights, we see that the prosecutor tendered him a lesser plea "from which he would have emerged perhaps with some jail time," and an understanding that "the nature and extent of his cooperation would be made known." (A. 35) For these benefits petitioner was to "lay out the conspiracy" and incriminate himself in other crimes without the insulation provided by a grant of immunity. If the prosecutor was so adamant about securing petitioner's cooperation, he should have chosen the one route authorized by Congress, *i.e.*, immunity from prosecution pursuant to 18 U.S.C. 6002 in exchange for petitioner's Fifth Amendment rights. If once immunized the latter still balked, then, and only then, could the district court properly punish him for his failure to cooperate in the investigation.

In ruling on the appropriateness, *vel non*, of considering a defendant's failure to inform in imposing sentence, the courts of appeals are divided on the issue and, indeed, some circuits appear internally divided. In commenting on the District of Columbia Circuit, Judge Bazelon observed:

> "In *United States v. McCord*, we suggested that a trial judge's consideration of defendant's failure to cooperate might necessitate vacation of sentence. Only a short time later in *United States v. Liddy*, a different panel concluded that that same factor was properly considered in imposing sentence." (Pet. App. 6a, footnotes omitted.)

In *United States v. Ramos*, 572 F.2d 360 (2d Cir. 1978), the Second Circuit was "more than somewhat in doubt" that the sentence was not influenced by the

defendant's refusal to cooperate and testify for the government. Since his refusal to testify "may have been an important factor in the sentence," the court vacated the sentence and ordered resentencing before a different judge. Perhaps a more comprehensive statement in the case is to be found in the concurring opinion of Judge Lumbard. He believed that if the government wanted the defendant's cooperation, it should have granted him immunity. Furthermore, cases permitting a trial court to mitigate a sentence because of cooperation were, he observed, not in point. "It is one thing to extend leniency to a defendant who is willing to cooperate with the government; it is quite another thing to administer additional punishment to a defendant who by his silence has committed no additional offense." In *Di Giovanni v. United States, supra*, Judge Lumbard writing for the court, found that the sentencing judge gave improper consideration to the defendant's refusal to cooperate with the government and vacated the sentence, ordering resentencing before another judge. In commenting on the government's argument that the district court properly considered the defendant's refusal to cooperate as evidence that he did not wish to turn away from his life of crime, the court observed:

> "... to permit the sentencing judge to infer, such lack of desire from a defendant's refusal to provide testimony would leave little force to the rule that a defendant may not be punished for exercising his right to remain silent. In any event, refusal to testify, particularly in narcotic cases, is more likely to be the result of well-founded fears of reprisal to the witness or his family."

Judge Lumbard again suggested that the government

could have given the defendant immunity if it wanted his testimony:

> "Had Di Giovanni been given immunity and still refused to testify, he could of course have been punished for contempt of court. For whatever reason, the government chose [not to do so], and consequently it cannot now argue that Di Giovanni's refusal to testify warranted imposition of a more serious sentence."

In *United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979)—a notorious drug conspiracy case—all appellants urged that the sentences should be vacated because the trial court improperly considered their failure to cooperate in imposing sentence. Writing for the majority, Judge Moore upheld the sentences although lack of cooperation was one factor the trial court did consider. In an apparent split from Judge Lumbard's view, the opinion went on to state:

> "In imposing sentence the court may consider a defendant's cooperation or lack thereof as long as *all* factors are considered." 604 F.2d at 154

See also, *United States v. Vermeulin*, 436 F.2d 72 (2d Cir. 1970), wherein Judge Moore writing for the court, approved of a harsher sentence imposed because of the defendant's uncooperative attitude. These cases from the Second Circuit demonstrate, at least, the great currency of the present issue and the differing views it generates among judges. Insofar as the other circuits are concerned, compare, *United States v. Rogers*, 504 F.2d 1079 (5th Cir. 1974) (Lack of cooperation improper factor); and *United States v. Garcia*, 544 F.2d 681 (3rd Cir. 1976) (same); *with, United States v. Miller*, 589 F.2d 1117 (1st Cir. 1978) (Lack of cooperation-proper

factor); and *United States v. Chaidez-Castro*, 430 F.2d 766 (7th Cir. 1970) (same).

The government seeks to prevail herein by urging that *Grayson v. United States*, 438 U.S. 41 (1978), upon reasonable interpretation supports the judgment below. See Opp. 3-6, Br. for Appellee 20-23. In *Grayson*, the defendant testified in an escape case that he did, in fact, escape from confinement, but defended on the theory that he was propelled into doing so by the fear of imminent violence directed at him by another inmate. Upon conviction, the district court sentenced him to a term of two years imprisonment, consecutive to his unexpired sentence, relying in part on the established fact that his defense "was a complete fabrication. . . ." In upholding the propriety of this sentencing factor, the Court observed:

> "A defendant's truthfulness or mendacity while testifying on his own behalf, almost without exception, has been deemed probative of his attitudes toward society and prospects for rehabilitation and hence relevant to sentencing." 438 U.S. at 50.

In light of the limitless source material available to a sentencing judge, 18 U.S.C. 3577, flagrantly lying under oath was a serious transgression properly to be considered by the district court, especially since that mendacity bore a rational connection to the negative prospects for the defendant's rehabilitation. In seeking to prohibit the sentencing judge from considering this highly relevant information which revealed an important aspect of the defendant's life, the latter propounded two arguments which the Court, upon analysis, found inadequate to their task. Grayson urged that (1) the

sentence violated due process because it punished him for the crime of perjury without a trial and (2) permitting consideration of perjury will "chill" defendants from testifying on their own behalf. As to (1), the Court held that Grayson was not being punished because he committed what may be labeled a crime, but rather, he was being punished because he lied under oath in front of the sentencing judge; an extremely antisocial act warranting sentencing consideration—the fact that his conduct may have also amounted to a crime was merely coincidental. As to (2), the Court held that a defendant has the absolute right to testify or not to testify, but, if he chooses to testify he has no protected right to commit perjury. Awareness that willful and material falsehoods might result in additional punishment, "cannot be deemed to affect the decision of an accused but unconvicted defendant to testify truthfully in his own behalf." 438 U.S. at 55.

In viewing the issue at hand, it can be said that cooperation with the authorities to ferret out serious narcotic violators, is a laudable endeavor which bears a rational connection to a defendant's willingness to shape up and change his behavior in a positive direction. Thus, such voluntary cooperation—which thereby waives Fifth Amendment rights—is properly considered by a sentencing judge. *United States v. Malcolm*, 432 F.2d 809, 817 (2d Cir. 1970). The converse, however, is not equally true, because there is no rational connection between a defendant's refusal to cooperate and a dimming of his prospects for rehabilitation. Even if such connection is found to exist, refusal to cooperate is still a factor properly barred from consideration by the sentencing judge.

A defendant who admits his guilt and pleads guilty, does not deepen his rift with society because he thereafter refuses to cooperate and expose himself or his family to the possibility of death or serious bodily injury. It would be a harsh society, indeed, which sought to punish one because he declined to become an available target in the government's war on crime. In this light, refusal to cooperate has zero bearing on a defendant's rehabilitative possibilities.

Should it be successfully argued that petitioner cannot rely upon this apprehension of harm as a legitimate inference to be drawn from his silence, we urge, that his failure to cooperate was inappropriately considered, in any event, for the reason that it trenched upon the exercise of his Fifth Amendment right to remain silent. In balancing the public's right to know against petitioner's constitutional rights, the former of necessity must yield. Full force and effect must be given to his unfettered exercise of so treasured a privilege; especially when its invocation, at the bottom line, did not seriously interfere with the public's access to petitioner's knowledge. Judicious use of the immunity statutes by the government would have righted this constitutionally protected imbalance and readily unleashed the sought-after facts.

In conclusion, whereas Grayson chose to act in a situation where he was not legally required to act but did so mendaciously, he appropriately suffered the consequences; on the other hand, petitioner chose not to act in a situation where he was not legally required to act and, accordingly, should not be penalized for literally doing nothing.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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